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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 600

J. M. HUBER CORPORATION,
*Petitioner,*

v.

FEDERAL POWER COMMISSION,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF FOR INTERVENOR, NORTHERN NATURAL GAS COMPANY, AS RESPONDENT IN OPPOSITION

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# INDEX


| | Page |
|---|---|
| Questions Presented | 2 |
| Preliminary Statement | 2 |
| Argument, Question I | 4 |
| Argument, Question II | 8 |
| Conclusion | 12 |


## CITATIONS

**Cases:**


| | |
|---|---|
| Connecticut Light and Power Co. v. Federal Power Commission, 324 U. S. 515 | 7 |
| Federal Power Commission v. J. M. Huber Corporation, D. C. New Jersey, 133 F. Supp. 479 | 6 |
| Federal Power Commission v. Panhandle Eastern Pipe Line Co., 337 U. S. 498 | 7 |
| Interstate Natural Gas Co. v. Federal Power Commission, 331 U. S. 682 | 5 |
| J. M. Huber Corporation v. Federal Power Commission, 3rd Cir., 236 F. 2d 550 | 2 |
| Panhandle Eastern Pipe Line Co. v. Federal Power Commission, 3rd Cir., 204 F. 2d 675 | 8 |
| Phillips Petroleum Co. v. Wisconsin, 347 U. S. 672 | 5, 6, 11 |


**Statutes:**


| | |
|---|---|
| Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C §§717, **et seq:** | |
| Section 1(b) | 3, 5 |
| Section 2(6) | 3 |
| Section 7(a) | 8 |
| Section 7(b) | 2, 4 |
| Section 7(c) | 2, 9 |
| Section 7(e) | 10, 11 |

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Petitioner J. M. Huber Corporation (Huber) has, in its Petition for Writ of Certiorari filed herein, set forth sufficient information with respect to the opinions in the Court and Commission below, the jurisdiction of this Court and the statutory provisions which this case involves. Further, Huber's statement of the case contains all of the factual data required to enable this Court to pass on the Petition for Writ of Certiorari, especially in view of the fact that Huber does not challenge, as being

unsupported by substantial evidence, any factual determinations arrived at by the Commission. Pursuant to the provisions of Rule 40 (3) of the Rules of the Supreme Court, 28 U. S. C., Northern Natural Gas Company (Northern), Intervenor-Respondent, will not, therefore, reiterate this information contained in Huber's Petition for Writ of Certiorari. Northern will, however, restate the questions which it believes are presented by said Petition and set forth a brief preliminary statement which, it is hoped, will serve to clarify and delineate the issues involved herein.

## QUESTIONS PRESENTED

Does the Federal Power Commission have jurisdiction, under Section 7(b) of the Natural Gas Act, to prevent the abandonment of a sale in interstate commerce of natural gas for resale by a natural gas company?

Does the Federal Power Commission have jurisdiction, under Section 7(c) of the Natural Gas Act, to issue a certificate of public convenience and necessity to a natural gas company which, though presently unwilling, has been willingly selling natural gas, under contract, in interstate commerce for resale since prior to enactment of the Natural Gas Act?

## PRELIMINARY STATEMENT

The Court of Appeals for the Third Circuit, in a well-reasoned opinion amply supported by statutory authority and judicial precedent, has answered the above-stated questions in the affirmative.[1] The Court considered and

1 **J. M. Huber Corporation v. Federal Power Commission,** 3rd Cir., 236 F. 2d 550. Hereafter, when referring to this decision, citation will be made to the appropriate page of the Appendix (App.) to Huber's Petition.

rejected each and every argument and pertinent citation of authority raised by Huber. Its decision, construing and applying the appropriate provisions of the Natural Gas Act[2] and prior judicial decisions rendered thereunder, is manifestly correct. Northern will hereinafter show that there is no conflict, in principle or otherwise, between the decision rendered below and decisions of this Court or other courts of appeals.

Further, there is no substantial federal question involved in this case which this Court should undertake to settle at this time. Admissions made by Huber during the course of this litigation have resolved that issue. Huber admits that it is a "natural-gas company"[3] within the meaning of the Natural Gas Act, §1(b). (See Huber's Petition for Writ of Certiorari, p. 6.) It admits that the sale of natural gas to Northern, involved herein, is a sale in interstate commerce for resale and is, therefore, subject to regulation by the Federal Power Commission (Commission).[4] Huber further admits that certain of its facilities are "used in and necessary to" the aforementioned sale to Northern (Huber Pet., p. 24). It disagrees only with the Commission's conclusion, affirmed by the Court below, that such facilities at the point of sale are "sales" facilities rather than "production" or "gathering" facilities. Clearly this administrative con-

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2 52 Stat. 821 (1938), as amended, 15 U. S. C. 717 et seq.

3 "'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." Natural Gas Act, §2(6), 52 Stat. 821 (1938), 15 U. S. C. §717a.

4 This recognition of jurisdiction was a prerequisite to Huber's attempt to invoke the "escape" clause of its contract with Northern. The court below clearly recognized this. See App. 5a (n. 1), 8a.

clusion, based as it was on substantial evidence, was within the fact-finding prerogatives of the Commission. Considered in its proper perspective, therefore, this case presents no federal question of such importance as to invoke this Court's discretionary power of review on certiorari.

## ARGUMENT

### Question I

Section 7(b) of the Natural Gas Act[5] provides that a natural-gas company may not abandon any of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, unless Commission approval is first obtained, and only then upon a finding by the Commission that the supply of gas is depleted to such an extent that continued service is unwarranted or that the present or future public convenience or necessity permit such abandonment. Huber is not contending that these statutory grounds for abandonment exist in this case. Instead, it has persistently maintained that it has no "facilities" subject to the jurisdiction of the Commission and that, therefore, it does not need Commission approval to abandon its sale of gas to Northern. In the face of substantial evidence and findings to the contrary, Huber argues that its facilities at the point of sale to Northern are production and gather-

5 Section 7(b) provides: "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment." [52 Stat. 824 (1938); 15 U. S. C. §717f(b).]

ing facilities and are, therefore, exempt from Commission jurisdiction under §1(b) of the Natural Gas Act.[6]

This Court's decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U. S. 672, completely refutes this argument of Huber. In that case, as here, the sale involved was made at a point where the interstate journey of such gas had begun. At that point nothing remained to be done by Phillips, or by Huber in this case, relating to the production or gathering of the gas. This Court in the *Phillips* case flatly rejected the argument that such sales are part of the business of producing and gathering natural gas, saying (347 U. S. 672, 678):

> We are of the opinion, however, that the [Commission's] finding is without adequate basis in law and that production and gathering, in the sense that those terms are used in §1(b), end before the sales by Phillips occur.

See also, *Interstate Natural Gas Co. v. Federal Power Commission*, 331 U. S. 682, 692. It would appear to be elementary that facilities used to consummate a sale, after production and gathering has ended, would be "sales" facilities rather than "production or gathering" facilities. The Commission (R. 17a)[7] and the court below

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6 Section 1(b) provides: "The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas." [52 Stat. 821 (1938); 15 U. S. C. §717(b).]

7 References to "R. —" are to the printed appendix to Huber's Brief in the court below, which is part of the record certified to this Court.

so held (App. 11a). Huber does not even attempt to show, in support of its argument, what production or gathering function these facilities perform. Its argument, in the final analysis, is that such facilities are known in the industry as "gathering" facilities and therefore should be exempt under §1(b). Such industry characterization is not determinative of their legal status under the Natural Gas Act. Cf. *Phillips Petroleum Company v. Wisconsin*, supra, at pp. 677, 678.

Since a sale of natural gas cannot be made without utilizing certain sales facilities, the Commission's jurisdiction under §7(b) to prevent the abandonment of such facilities, or the service rendered by means thereof, must necessarily be as broad in scope as the jurisdiction granted in §1(b) to regulate the sale itself. This is the clear holding in *Federal Power Commission v. J. M. Huber Corporation*, D. C., New Jersey, 133 F. Supp. 479. That case, which arose out of the same set of facts as the case at bar, involved an injunction proceeding by the Commission to restrain Huber from violating §7(b) of the Natural Gas Act by discontinuing sales of gas to Northern. In rejecting the same argument which Huber is presently advancing to this Court, the District Court held (133 F. Supp. 479, 487):

> * * * this Court has already held that Huber's sales to Northern are within the Commission's jurisdiction and since a sale of natural gas cannot be made without the use of facilities, power to control the sale includes power over facilities and thus Huber does have "facilities subject to the jurisdiction of the Commission" within the meaning of 7(b). See *Hartford Electric Light Co. v. Federal Power Comm.*, 2 Cir., 1942, 131 F. 2d 953, certiorari denied 1943, 319 U. S. 741, 63 S. Ct. 1028, 87 L. Ed. 1698.

It is clear, therefore, that the lower court correctly held that Huber has facilities subject to the jurisdiction of the Commission and must, in order to abandon such facilities or the service rendered by means thereof, meet the statutory requirements of §7(b) of the Natural Gas Act.

Huber's attempt to establish a conflict between the decision herein and decisions of this Court and other courts of appeals has been in vain. The case of *Federal Power Commission v. Panhandle Eastern Pipe Line Company*, 337 U. S. 498, chiefly relied on, is so dissimilar factually as to afford no help to Huber. That case involved the sale of gas leaseholds by a natural-gas company. This Court held that the transfer of gas leaseholds is an activity relating to the production and gathering of gas, and, therefore, excluded from the coverage of the Natural Gas Act. But that case contains no language which could possibly be construed to deny jurisdiction of the Commission to prevent the abandonment of facilities used in making sales of natural gas *admittedly* subject to its jurisdiction.

Huber's reliance on the case of *Connecticut Light and Power Co. v. F. P. C.*, 324 U. S. 515, as establishing a conflict in decisions, is also misplaced. That case involved the exemption of local distribution facilities under §201(b) of the Federal Power Act.[8] This Court, in construing this provision of the Federal Power Act, held that the test to be employed is whether the facilities involved are, in fact, "local distribution facilities" (324 U. S. 515, 531). So, in this case, the true test is whether Huber's facilities at the point of sale to Northern are "sales"

8 49 Stat. 847 (1935); 16 U. S. C. §824(b).

facilities or "production or gathering" facilities. The Commission found as a fact that such facilities are "sales" facilities (R. 17a). The lower court affirmed such finding as being based on substantial record evidence (App. 11a). Thus there is not the slightest conflict between the decision herein and this Court's decision in *Connecticut Light and Power Co. v. F. P. C.*, supra.

Huber also attempts to show a conflict between the lower court's decision herein and its earlier decision in *Panhandle Eastern Pipe Line Co. v. F. P. C.*, 3rd Cir., 204 F. 2d 675. The short answer to this argument is, of course, that no conflict exists since the later decision is ordinarily considered controlling within the circuit. There is in fact, however, no conflict between the two decisions since the *Panhandle* case involved the question of the Commission's authority, under §7(a) of the Natural Gas Act, to compel a natural-gas company to enlarge its transmission facilities.

Huber has, therefore, failed to present any convincing reason why this Court should undertake to review the decision herein respecting the Commission's authority to prevent the abandonment of facilities, or services rendered by means thereof, under §7(b) of the Natural Gas Act.

**Question II**

Having once established that Huber is a natural-gas company subject to all of the provisions of the Natural Gas Act, and the rules and regulations of the Commission issued pursuant thereto, there is no problem respecting the Commission's authority to issue a certificate of

public convenience and necessity covering the sale and service involved. Under §7(c)[9] of such Act the burden is upon Huber to obtain such a certificate. Its failure to do so subjects it to the penalty provisions of said Act. Its mere unwillingness to serve constitutes no defense, of course, to noncompliance with the law.

Disregarding Huber's obligation to obtain a certificate, however, it is clear that the Commission has statutory authority to issue a certificate in this situation. Section 7(c) of the Natural Gas Act prohibits a natural-gas company from engaging in the transportation or sale of natural gas subject to the jurisdiction of the Commission "unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations." The "grandfather clause" of such sec-

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9 Section 7(c), as amended on February 7, 1942, and as presently effective, provides: "No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: **Provided, however,** That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful." [52 Stat. 825 (1938), as amended; 56 Stat. 83 (1942); 15 U. S. C. §717f(c).]

tion provides that the Commission shall issue certificates without further proof of public convenience and necessity to companies engaged in such transportation or sale on the effective date of the amendatory Act, if applications therefor are made within ninety days thereof. Huber contends that since its application for a certificate was not made until September 24, 1954, it may not be issued a certificate under §7(c). It argues that such a certificate must be issued under §7(e),[10] which requires a "willing" applicant.

The Commission (R. 13a-16a) and the Court (App. 12a-13a) below correctly held that Huber's failure to apply for a certificate within ninety days of the date of the amendatory Act did not now deprive the Commission of jurisdiction to issue a certificate under §7(c). Huber was making jurisdictional sales and rendering jurisdictional service on the date of the amendatory Act and has continued to do so until the present time, all without benefit of a certificate. It now seeks to avoid regulation by relying on the fact that it failed to obtain a certificate under Section 7(c) within the time prescribed therein.

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10 Section 7(e) provides: "Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require." [56 Stat. 84 (1942); 15 U. S. C. §717f(e).]

Its argument that it did not do so because the Commission had failed to assert jurisdiction over independent producers until 1954 does not alter the status of the law. The decision in the *Phillips* case, *supra,* did not effect any change in the law. It was merely an enunciation and declaration of the law as it has existed since the passage of the Natural Gas Act in 1938, as amended in 1942. The action of the Commission in requiring independent producers who were making jurisdictional sales *on* and after June 7, 1954, to obtain certificates covering such sales was, therefore, in complete harmony with the letter of the statute, as construed in the *Phillips* case.

The Commission (R. 16a) and the Court below (App. 13a-14a) also correctly held that §7(e) applications relate to new service and not to service in effect on February 7, 1942. Huber's unwillingness to accept a certificate and continue to sell gas to Northern is, therefore, not pertinent to a determination of the Commission's authority to issue a certificate under §7(e). The statement of the court below in passing upon Huber claim of "unwillingness" to serve is especially illuminating (App. 14a):

> Irrespective of Section 7(e), under the law and the facts petitioner's unwillingness to accept its certificate offers no real problem. The jurisdictional sections of the Act, 1(b) and 7(b) obviously do not rely upon the certificate provisions of 7(e). The pertinent amendments to the latter did not come into existence until almost four years after Sections 1(b) and 7(b) had been enacted. In Section 7(e) as amended there is nothing about the need of a gas company accepting a certificate. As we see it, with the certificate properly issued, Huber's attempted defiance of the Commission's rightful exercise of its authority is of no importance.

Huber's failure to establish a conflict of decisions on this question of the Commission's authority to issue a certificate under §7(c), and the obvious correctness of the lower court's decision herein, justify this Court's denial of certiorari on this issue raised in Huber's petition.

## CONCLUSION

Northern respectfully submits that Huber has presented no special and important reasons why this Court should exercise its discretionary powers of review in this case. The affirmance by the court below of the Commission's order presents no conflict of decisions or need for further review. The Petition for Writ of Certiorari should, therefore, be denied.

Respectfully submitted,

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